

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

DARREN RICHARD GENTILQUORE,

Appellant

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

No. 1461 MDA 2012

Appeal from the Order of July 9, 2012  
in the Court of Common Pleas of Susquehanna County,  
Criminal Division at No. CP-58-CR-0000183-2006

BEFORE: SHOGAN, MUNDY and COLVILLE\*, JJ.

MEMORANDUM BY COLVILLE, J.:

**FILED SEPTEMBER 12, 2013**

Appellant, Darren Richard Gentilquore, appeals from the order entered on July 9, 2012, which denied his petition for relief filed pursuant to the Post Conviction Relief Act ("PCRA"). We reverse and remand.

A previous panel of this Court summarized the procedural history of this case as follows.

Following a jury trial on November 15, 2006, Gentilquore was convicted of two counts of attempted criminal homicide, 18 PA.CON.S.TAT.ANN. § 2501(a) and 901(a), for shooting two individuals during an altercation with several neighbors at Gentilquore's barn/residence. Subsequent thereto on December 21, 2006, Gentilquore was sentenced to an aggregate period of 40 to 80 years' imprisonment. Gentilquore filed a motion for reconsideration, which the trial court denied.

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\*Retired Senior Judge assigned to the Superior Court.

Gentilquore filed a direct appeal to this Court challenging only the discretionary aspects of his sentence. Prior to this Court's disposition of Gentilquore's appeal, Gentilquore filed a *pro se* PCRA petition on September 4, 2007. Gentilquore's PCRA petition was held in abeyance pending disposition of his appeal docketed at No. 547 MDA 2007.

This Court found Gentilquore's challenge to the discretionary aspect of his sentence waived as a result of counsel's failure to include a Pa.R.A.P. 2119(f) statement. As a result, we affirmed Gentilquore's judgment of sentence.

On December 7, 2007, Gentilquore filed a second amended PCRA petition, asserting various forms of ineffective assistance of counsel against both trial counsel and appellate counsel. On February 22, 2008, the PCRA court issued notice of its intention to dismiss Gentilquore's second amended PCRA petition without an evidentiary hearing pursuant to Pa.R.Crim.P. 907(1). On March 3, 2008, in response to the notice of intent to dismiss, Gentilquore filed an explanation as to why his PCRA petition should not be dismissed. Thereafter, on April 30, 2008, both counsel and Gentilquore, acting *pro se*, filed a third amended PCRA petition. An evidentiary hearing was held on that same date and evidence was presented on a single issue when it was determined that appellate counsel could no longer continue with representation based upon the ineffectiveness claims asserted.

New counsel, Robert M. Buttner, Esquire, was appointed as PCRA counsel. A fourth amended PCRA petition was filed on March 2, 2010 wherein Gentilquore incorporated his previous allegations and raised new issues and claims of ineffective assistance against both trial counsel and appellate counsel. Gentilquore also requested a new evidentiary hearing. The Commonwealth filed an answer to Gentilquore's fourth amended PCRA petition on March 29, 2010. A fifth amended PCRA appears docketed of record on April 5, 2010.

On July 12, 2010, the PCRA court issued an order and accompanying opinion denying Gentilquore's PCRA petition.

***Commonwealth v. Gentilquore***, 38 A.3d 924 (Pa. Super. 2011) (unpublished memorandum at 1-3). Appellant appealed and this Court

vacated the PCRA court's order and remanded for further proceedings. Specifically, this Court concluded that the PCRA court violated Pennsylvania Rule of Criminal Procedure 907 by not providing notice to Appellant of its intent to dismiss his petition without a hearing.

On remand, the PCRA court entered an order on March 21, 2012, notifying Appellant of its intention to dismiss his PCRA petition pursuant to Pa.R.Crim.P. 907. On May 2, 2012, Appellant filed an amended PCRA petition and response to the PCRA court's Rule 907 notice. On July 9, 2012, the PCRA court, after considering Appellant's amended PCRA petition and response to its Rule 907 notice, entered an order and accompanying opinion dismissing each of Appellant's requests for PCRA relief. This timely appeal followed.

Appellant raises the following issues for our review.

1. Did the [PCRA c]ourt abuse its discretion or err as a matter of law in dismissing [Appellant's] Motions for Post Conviction Relief without complying with the dictates of Pa.R.Crim.P. 902(a)(15) and indicating the reasons why the [PCRA c]ourt intended to dismiss [Appellant's] Second Amended Motion for Post Conviction Relief?
2. Did the [PCRA c]ourt abuse its discretion or err as a matter of law in concluding that Trial Counsel did not render ineffective assistance of counsel when he failed to object to the disclosure at trial of [Appellant's] exercise of his right to remain silent while in custody in that the record supports that [Appellant] requested the assistance of counsel in conjunction with his refusal to give a written statement?
3. Did the [PCRA c]ourt abuse its discretion or err as a matter of law in dismissing [Appellant's] Motions for Post Conviction Relief in declining to apply 18 Pa.C.S.A. 505(b)(2.1), better known as the Castle Doctrine, retroactively?

4. Did Trial Counsel render ineffective assistance in failing to object to the addition to the self-defense instruction that if [Appellant] complied with Ryan's demand to stop shooting, [Appellant] could avoid the necessity of using deadly force?
5. Did Trial Counsel render ineffective assistance in failing to object to the self-defense instruction and then in failing to request that the Court clarify that the Pole Barn and doorway thereto were part of [Appellant's] dwelling?
6. Did Trial Counsel render ineffective assistance in failing to object to the imperfect self-defense instruction and then in failing to request that the Court instruct the jury that they must acquit [Appellant] of attempted murder if they find that [Appellant] had acted under an unreasonable belief?
7. Did Appellate Counsel render ineffective assistance of counsel in failing to appeal the admission of testimony from Alex Vis, Peter Hogle and John Beaudry, where the Trial Court found same admissible under Pa.R.E. 404(b)(2) for the purpose of establishing state of mind of [Appellant] toward his property and motive and intent of [Appellant] to shoot the Bigelows?
8. Did the [PCRA c]ourt err or abuse its discretion in dismissing [Appellant's] Second Amended Motion for Post Conviction Relief and declining to reinstate his direct appellate rights where Appellate Counsel waived the sole issue raised on appeal in failing to include a Pa.R.A.P. 2119(f) statement in his brief?

Appellant's Brief at 4.

The following legal principles are relevant to our discussion. To establish ineffectiveness of counsel, a PCRA petitioner must show the underlying claim has arguable merit, counsel's actions lacked any reasonable basis, and counsel's actions prejudiced the petitioner. **Commonwealth v. Cox**, 983 A.2d 666, 678 (Pa. 2009). Prejudice means that, absent counsel's conduct, there is a reasonable probability the outcome of the proceedings would have been different. **Id.**

Our standard for reviewing PCRA orders is to determine whether the court's rulings are supported by the record and free of legal error. ***Commonwealth v. Bennett***, 19 A.3d 541, 543 (Pa. Super. 2011).

Because we find Appellant's eighth issue to be dispositive, we first address Appellant's claim that he is entitled to PCRA relief in the form of reinstatement of his direct appeal rights based on direct appeal counsel's ineffectiveness in failing to include a Pa.R.A.P. 2119(f) statement in Appellant's brief, resulting in waiver of his sentencing claims. The PCRA court dismissed Appellant's ineffectiveness claim on the basis that Appellant's underlying discretionary sentencing claim lacked arguable merit as this Court on direct appeal had noted in *dicta* that one of Appellant's claims did not present a substantial question. Appellant argues the PCRA court's reasoning is erroneous and contrary to this Court's decision in ***Commonwealth v. Johnson***, 889 A.2d 620 (Pa. Super. 2005). We agree.

In ***Johnson***, the appellant filed a direct appeal challenging the discretionary aspects of his sentence. This Court affirmed the judgment of sentence finding the appellant's sentencing claim to be waived based, in part, on direct appeal counsel's failure to comply with Rule 2119(f). Thereafter, the appellant filed a PCRA petition alleging the ineffectiveness of appellate counsel and seeking the reinstatement of his right to a direct appeal, which the PCRA court denied. In concluding that the appellant was entitled to have his direct appeal rights reinstated *nunc pro tunc*, the ***Johnson*** court explained:

It is true that there is no absolute right to challenge the discretionary aspects of a sentence. ***See Commonwealth v.***

**Tuladziecki**, 513 Pa. 508, 511, 522 A.2d 17, 18 (1987). There is, however, a right to seek appellate review of the discretionary aspects of a sentence by including a Pa.R.A.P. 2119(f) statement in the appellate brief. **See** 42 Pa.C.S.A. § 9781(b). Counsel had a responsibility to protect this right. **See Commonwealth v. Liebel**, 573 Pa. 375, 380-81, 825 A.2d 630, 633 (2003) (stating that a person seeking allowance of appeal is entitled to the assistance of counsel under Pa.R.Crim.P. 122). Thus, counsel's failure to include a Pa.R.A.P. 2119(f) statement in the brief compromised appellant's direct appellate rights. **See Hernandez**, 755 A.2d [1,] 11-12 & n. 6 [(Pa. Super. 2000)] (holding that trial counsel's ineffectiveness denied the appellant his right to a direct appeal, even though the one claim waived by counsel's failures involved the discretionary aspects of the sentence); **see also Liebel**, 573 Pa. at 384, 825 A.2d at 635 (holding that counsel's failure to petition for allowance of appeal with our Supreme Court was ineffectiveness denying the appellant his right to a direct appeal, regardless of whether the Supreme Court would have granted review, because although there is no right of appeal to the Supreme Court, there is a right to seek such appeal).

**Id.** at 623-24.

Additionally, the **Johnson** court noted that,

although we concluded in *dicta* on direct appeal that [the] appellant would not have been entitled to relief on the merits, this did not constitute the "independent legal review of his case that he was entitled to." **See Franklin**, 823 A.2d [906,] 910 [(Pa. Super. 2003).] [The a]ppellant has not yet had a "full, fair, and counseled opportunity to present his claims." **See id.** at 909 (quotation omitted) (emphasis in original).

**Id.** at 624.

We find **Johnson** to be controlling in the instant case. Contrary to the reasoning of the PCRA court, Appellant was not required to establish that he would have been entitled to have this Court address the merits of his claim

in order to be entitled to PCRA relief. Instead, Appellant was required to establish that counsel's ineffectiveness denied him the right to a direct appeal. Here, Appellant filed a direct appeal challenging only the discretionary aspects of his sentence which this Court found to be waived based on counsel's failure to include a Rule 2119(f) statement in Appellant's brief. Thus, counsel's failure to include a Pa.R.A.P. 2119(f) statement in the brief compromised Appellant's direct appellate rights. Moreover, although this Court noted, in denying Appellant's direct appeal, that Appellant's claim that the imposition of consecutive sentences was excessive did not present a substantial question, arguably noting that Appellant would not have been entitled to relief on the merits of one of his sentencing claims,<sup>1</sup> this observation did not constitute the "full, fair, and counseled opportunity" to present his claims to which he was entitled. **Johnson**, 889 A.2d at 624.

For these reasons, Appellant's ineffective assistance of counsel claim entitles him to PCRA relief. Accordingly, we reverse the PCRA order and remand to the PCRA court with directions to reinstate Appellant's right to file a direct appeal *nunc pro tunc*.

Order reversed. Case remanded. Jurisdiction relinquished.

Judge Mundy files a Dissenting Memorandum.

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<sup>1</sup> On direct appeal, Appellant argued his sentence was excessive because the court sentenced him to consecutive sentences, he lacked a prior record, and the record improperly relied on alleged bad acts. **See Commonwealth v. Gentilquore**, 938 A.2d 1113 (Pa. Super. 2007) (unpublished memorandum at 2).

J-S25020-13

Judgment Entered.

Mary A. Graybill  
Deputy Prothonotary

Date: 9/12/2013